

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Salinas, CA)

KSBW TV, HEARST-ARGYLE STATIONS INC.¹

Employer

and

Case No. 32-RC-4821

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 45**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds:²

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find that the Employer is a Nevada corporation, engaged in the operation of a television broadcasting station in Salinas, California. During the past 12 months, a representative period, the Employer has received gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$5,000 directly from suppliers located outside the State of California. Accordingly, I find

¹ The Employer's name appears as amended at the hearing.

² The Employer and the Petitioner filed timely briefs, which have been duly considered.

that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent all full-time and regular part-time master control operators, maintenance engineers, production assistants, directors, news photographers, chief news photographer, tape coordinators, associate producers employed by the Employer at its Salinas, California facility. The Employer contends the chief photographer should be excluded from the unit as a supervisor within the meaning of Section 2(11) of the Act and that the custodian should be included in the unit.

THE FACTS

The Employer is a NBC affiliate television station covering the California Central Coast area, which includes the counties of Santa Cruz, San Benito and Monterey. The president and general manager is Joseph W. Heston. Lawton Dodd, Kelly McDonald and Tim Bollinger are the news director, the assistant news director and assignment editor, respectively, and are part of the “news management team” of the Employer.

The following positions are employed in the news department: anchors, reporters, producers and photographers. The following positions are employed in operations: master control operators, directors, tape operations coordinator and

production assistants. The technical employee positions are maintenance engineers and assistant chief engineer.

The Employer employs 8 news photographers plus a chief news photographer, Kevin Tosolini. The photographers nominally report to Tosolini. The duties of the photographers are: shoot videotape for news stories with a portable video camera, work with recorders in the shooting of videotape, transport the videotape to the station by either physically doing so or via microwave truck, and edit videotape. The chief news photographer also performs each of these duties on a daily basis. The chief news photographer performs additional duties, which the Employer asserts are supervisory under Section 2(11) of the Act.

The Employer created the position of chief news photographer in early 2000 and thereafter hired Tosolini, who reports to Dodd, in February 2000. The position was created in order to provide Dodd with assistance on technical and equipment issues related to photography as well as to provide assistance on hiring photographers. When Tosolini was hired, a memorandum issued which stated he would be an "integral part of the news management team" and "be charged with supervising and mentoring the photography staff". Although Tosolini did not recall being told that he was to be part of the management team, he testified Dodd told him it was a supervisory position.

The chief news photographer is a salaried employee who earns approximately \$34,000 a year. Undisputed members of the Employer's aforementioned news management team, McDonald and Bollinger, earn salaries of \$58,000 and \$35,000, respectively. The news photographers are hourly paid employees who average \$22,776 a year and work some overtime per week. All of the employees of the

Employer are provided the same fringe benefits, health insurance, life insurance, vacation and holidays.

The issue of whether the chief news photographer is a supervisor focuses on his role in hiring photographers, granting overtime, making job assignments, counseling employees and recommending a wage increase. Concerning the hiring of news photographers, Tosolini reviews resumes and demo tapes of interested applicants, at the request of Dodd, and determines which applicants are qualified for consideration. If Tosolini determines an interested person is not qualified or unsuitable for the job, then that person does not receive any further consideration. If the applicant is qualified, then Dodd requests Tosolini to conduct an initial phone interview. After this phone interview, Tosolini informs Dodd whether the applicant is worthy of further consideration. On two occasions, Tosolini has determined applicants were not worthy of further consideration and Dodd accepted Tosolini's word. The next step is a field demonstration, wherein Tosolini takes the applicant into the field to watch his work. Additionally, an in-person interview is conducted with Dodd and Tosolini present. Afterwards, Tosolini makes a recommendation on whether the applicant should be hired. Since Tosolini was hired, the Employer has hired 3 news photographers and on each occasion, Tosolini has recommended the applicant for hire. Additionally, he has recommended two applicants not be hired and they were not hired.

The record evidence establishes Tosolini has limited authority concerning the granting of overtime and making assignments. Specifically, the Employer utilizes numerous news photographers on Friday night in September, October and November to cover high school football games. These assignments require overtime work for many

photographers. Dodd, in agreeing to the utilization of a promotion called "Operation Football", realized that the photographers would be working overtime for these Friday night assignments. Tosolini, in conjunction with sports anchor Matt Smith, determines which photographers will be used for the football games and who will be assigned to what game(s). "Operation Football" is the only time wherein Tosolini grants overtime and makes job assignments.

The chief news photographer has not issued any formal discipline to employees nor recommended discipline to employees. But, Tosolini has "counseled" two employees. On one occasion, a news photographer made a "crass gesture" (otherwise unexplained) while on the air and Dodd requested Tosolini to counsel him on this matter. Tosolini did so by informing the employee he should never do that again. On another occasion, Tosolini found out a news photographer was not showing up on time and spoke to him about the necessity of timeliness. Tosolini did so without Dodd asking him to do so. No written records were made of these counselings and the Employer does not have any particular disciplinary policy.

The chief news photographer does not evaluate employees in writing. Tosolini verbally informs Dodd how the news photographers are doing. On one occasion, Tosolini told Dodd that the Employer might lose an employee, Andres Valenzuela, if that employee's wages were not raised and Dodd granted a wage increase to that employee.

Additional authority of the chief news photographer include training newly hired photographers for two or three days, making recommendations for equipment needs for photographers, investigating incidents (an automobile accident and an assault involving

news employees), assigning new trucks and equipment to photographers (in doing so, Tosolini receives the best vehicle and equipment) and making necessary purchases for photographers.

The other position in dispute is the custodian. The custodian works from about 3:00 p.m. to 11:30 p.m. and cleans the studio, news offices and all other areas of the Employer's facility. During his hours of work, the custodian interacts with other job classifications being sought during the preparation and presentation of the late evening newscast. The custodian reports to Jim Grimes, the chief engineer, who is over all of the technical and operations employees. The custodian is paid \$10.50 an hour or about \$21,800 a year and is eligible for the same benefits as all other employees. The production assistants earn \$9.00 an hour. Under a prior owner, from 1974 to 1989, the custodian was included in a certified bargaining unit of engineering, production, news, traffic and maintenance employees represented by another local of the IBEW.

POSITIONS OF THE PARTIES

The Employer asserts the chief news photographer is a supervisor under Section 2(11) of the Act because of his authority in recommending employees for hire, determining which applicants will not be given further consideration for hire, granting overtime and making job assignments, counseling employees, which the Employer contends are verbal warnings, investigating situations, such as an automobile accident and an assault, and recommending an employee for a wage increase.

The Petitioner asserts the chief news photographer does not have supervisory authority. Specifically, the Petitioner asserts he merely interviews applicants without making effective recommendations, the overtime worked for "Operation Football" was

previously approved by Dodd, when he agreed to this promotion, the job assignments are in conjunction with the sports anchor and are not evidence of statutory supervisory authority and the counselings are not discipline.

The Petitioner contends the custodian does not have a community of interest with the unit employees because his job is not related to the production of newscasts. The Employer asserts the custodian works with the unit employees and has a community of interest with them.

ANALYSIS

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. **Bennett Industries, Inc.**, 313 NLRB 1363 (1994). Section 2(11) of the Act defines a supervisor as one who possesses "authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner which is more than routine or clerical. **Harborside Healthcare, Inc.**, 330 NLRB No. 191 (2000).

I find the chief news photographer has the authority to effectively recommend employees for hire and not for hire; thus, the chief news photographer is a supervisor under Section 2(11) of the Act. Specifically, the record evidence establishes the chief

news photographer has effectively recommended each of the three photographers who were hired in 2000 and has effectively recommended two applicants, who had in-person interviews and field demonstrations, not be hired as news photographers. Furthermore, Tosolini, on behalf of the Employer and without the approval of Dodd, has rejected certain applicants after the review of their resumes and demo tapes. The Board in **Queen Mary**, 317 NLRB 1303 (1995), and **Northwest Publications, Inc.**, 116 NLRB 1578, 1579 (1956), found a chief engineer and chief photographer were statutory supervisors where the individual effectively recommended which applicants were hired or not hired.

I find the record evidence does not establish the chief news photographer has any other supervisory authority. Specifically, the counselings of employees by Tosolini are not disciplinary in nature because they had no impact on the employees' employment status. **Alois Box Co.**, 326 NLRB 1177, 1177-78 (1998). Moreover, on one occasion, Tosolini was merely acting as a conduit of information from Dodd. Furthermore, the record evidence is insufficient to find that the chief news photographer effectively recommends rewarding employees. Instead, the record evidence established the news photographer merely answered general questions concerning the photographers' job performance, which is insufficient to establish supervisory authority. **Azusa Ranch Market**, 321 NLRB 811, 813 (1996). In the situation involving employee Valenzuela, Tosolini did not make a specific recommendation on a wage increase for that employee. In **MJ Metal Products**, 325 NLRB 240, n. 2 (1997), the Board found an individual's comment, "something be done" about a specific employee was not an effective recommendation even though action was thereafter taken concerning this

employee. Concerning his authority on overtime and job assignments, I find this does not entail supervisory status. Dodd, the news director, has already preapproved the overtime by agreeing to the promotion of "Operation Football". Moreover, the determination of which photographers are sent to which football games does not involve the use of discretion, sufficient to confer supervisory authority. Finally, the chief news photographer's investigation of an automobile accident and an assault involving news personnel does not amount to adjustment of grievances.

Concerning the custodian, I must apply the community of interest analysis, wherein a number of factors are considered including the similarity of duties, job qualifications, wages, benefits and working conditions, extent of interaction and interchange, organizational structure, functional integration of the business, history of collective bargaining and the scope of the petitioned-for unit. **Kalamazoo Paper Box Corp.**, 136 NLRB 134 (1962). In applying this analysis, the record establishes the custodian's wages, benefits and working conditions are similar to other unit employees, he is supervised by Grimes, the same supervisor who is over the operations and technical employees, the position was included in a similar unit at the predecessor, and the scope of the overall unit is fairly broad. Although the job duties and qualifications are different for a custodian and other unit positions, the record establishes many unit positions have different duties and qualifications. Also, the lack of interchange between the custodian and other unit employees is inconsequential since the record establishes many other unit employees only perform their job, not other jobs in the unit. Overall, I find the custodian has a community of interest with the unit employees. Finally, the

custodian would be the only unrepresented employee if he were not included in the petitioned-for unit.

Accordingly, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act and shall direct an election among these employees:

All full-time and regular part-time master control operators, maintenance engineers, production assistants, directors, news photographers, tape coordinators, associate producers and custodians employed by the Employer at its Salinas, California facility, excluding all producers, reporters, anchors, weekend producer/assignment editor, office clerical employees, promotion employees, sales employees, guards and supervisors as defined in the Act.

There are approximately 30 employees in the voting unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United

States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by the

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 45

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care 359 Facility*, 315 NLRB 359, 361 n. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **December 20, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570.

This request must be received by the Board in Washington by December 27, 2000.

Dated at Oakland, California this 13th day of **December, 2000**.

Bruce I. Friend, Acting Regional Director
National Labor Relations Board
Region 32
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Digest Number:

177-8520-0800
177-8520-1600
177-8560-0100